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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

C.W. ROEN CONSTRUCTION CO.,
BRUCE A. ROEN, and JERALDINE C. BREAULT,
Petitioners,

vs.

UNITED STATES OF AMERICA, ex rel.
PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 38
and LAWRENCE J. MAZZOLA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES P. WATSON
Counsel of Record

STANTON, KAY & WATSON, LLP

101 New Montgomery Street, Fifth Floor
San Francisco, California 94105
(415) 512-3501

Attorneys for Petitioners
C.W. ROEN CONSTRUCTION CO., et al.

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QUESTIONS PRESENTED FOR REVIEW

1. Does a *qui tam* plaintiff suing under the federal False Claims Act, 31 U.S.C. Section 3729, *et seq.* meet the "scienter" requirement of the Act when its claims are based upon alleged misclassification of work and alleged failure to pay prevailing wages to employees whose work is the subject of an ongoing and unresolved jurisdictional dispute between two major craft unions, and when the U.S. Department of Labor has made no determination of the underlying prevailing wage and job classification issues?

2. May the U.S. District Court make any determination regarding a claim of failure to meet prevailing wage and job classification requirements when (a) the U.S. Department of Labor has made no determination of prevailing wage rates or any specific job classification determinations for any of the work in dispute and (b) the determination of whether any workers were misclassified must depend upon an initial administrative determination of what prevailing wages apply to the classifications for the work in question?

3. May the U.S. District Court act in place of a federal administrative agency (in this case, the U.S. Department of Labor) and make its own quasi-legislative determinations regarding prevailing wage rates and job classifications when (a) such administrative determinations will necessarily affect third parties that are not represented in this litigation; (b) the District Court has neither the resources nor the expertise to assume the role of an administrative agency?

LIST OF PARTIES TO THE PROCEEDING

Petitioners are C.W. Roen Construction Co., Bruce A. Roen and Jeraldine C. Breault. C.W. Roen Construction Co. is a closely held corporation owned by Bruce Roen and family members. There are no corporate parents or corporate subsidiaries. Bruce A. Roen and Jeraldine C. Breault are individuals who reside in California and do business in Contra Costa County, California.

Respondents are United States of America, ex rel. Plumbers and Steamfitters Local Union No. 38 and Lawrence J. Mazzola. Local Union No. 38 is an unincorporated labor association headquartered in San Francisco, California. Lawrence J. Mazzola is an individual doing business in the City and County of San Francisco, California, and is an officer of Local Union No. 38.

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PETITION FOR WRIT OF CERTIORARI

Petitioners C.W. Roen Construction Co., Bruce A. Roen, and Jeraldine C. Breault respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 13, 1999.

I.
OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit (Appendix A herein) is reported at 183 F.3d 1088. The order of that Court denying the Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix B herein) filed August 26, 1999, is not reported. The opinion of the U.S. District Court for the Northern District of California (Appendix C herein) is not reported.

II.
JURISDICTION

The opinion of the U.S. Court of Appeals for the Ninth Circuit was filed on July 13, 1999. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed, and was denied on August 26, 1999.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

This Petition is timely filed with this Court under the provisions of 28 U.S.C. Section 2101(c).

III.

STATUTORY PROVISIONS INVOLVED

The statutory provisions immediately involved in this action are the provisions of the False Claims Act, 31 U.S.C. Sections 3729-33; a copy of the pertinent statutory provisions is appended hereto in Appendix D.

In addition, the provisions of the Davis-Bacon Act, 40 U.S.C. Section 276(a), *et seq.* are implicated; a copy of the applicable provisions is attached hereto in Appendix D.

IV.

A. STATEMENT OF THE CASE

The present action is one of five cases in which labor unions have sought to use the *qui tam* provisions of the federal False Claims Act, 31 U.S.C. § 3729, et seq., to wrest work away from other unionized construction crafts. Three of the actions were dismissed on motions to dismiss or for summary judgment; see *U.S. ex rel. Windsor v. DynCorp, Inc.*, 895 F.Supp. 844 (E.D. Va. 1995); *U.S. ex rel. IBEW Local 217 v. G. E. Chen Construction*, 954 F.Supp. 195 (N.D. Cal. 1997)[1]; *U.S. ex rel. Plumbers & Steamfitters Local 342 v. Dan Caputo Co.*, (USDC Case No. C-95-0784 MMC, *remanded* 152 F.3d 1060 (9th Cir. 1999). The fourth case, *U.S. ex rel. Plumbers & Steamfitters Local 159, et al. v. Kiewit Pacific Co.*, (USDC Case No. C-93-3187 CAL), was dropped after the employer acceded to the relator union's demand that it sign a collective bargaining agreement with the union. There

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[1]A portion of the *Chen* action, unrelated to employment classification issues, was not dismissed.

appears to be no case other than the present action in which any Court has ruled that the relators can state a viable claim based on facts parallel to those presented by these suits. The United States has declined to participate in any of these actions. For the reasons set forth herein, the trial court correctly ruled that the defendants are entitled to judgment as a matter of law. This Court should grant certiorari to review the significant legal issues presented to the Court for the first time by this case.

B. FACTUAL BACKGROUND

This case is the latest chapter in an apparently unending saga of efforts by local unions affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (hereinafter the "UA") to compel contractors to pay UA-negotiated wages on federally funded construction projects; union locals affiliated with the Laborers International Union of North America ("LIUNA") and the Northern California District Council of Laborers ("NCDCL") also claim this work for their members.

The facts giving rise to this dispute are well stated in an opinion by the California District Court of Appeals, *Pipe Trades District Council v. Aubry*, 41 Cal.App.4th 1457 (1996). The Court of Appeal noted:

> "Both in Northern California and elsewhere in the nation jurisdictional disputes have regularly existed between the UA [i.e., the Plumbers and Steamfitters Union] and the Laborers. Focusing on recent times in Northern California, a *long-running dispute has existed between these unions as to which*

one has jurisdiction over the installation of various kinds of piping for various types of water treatment plants. In August of 1979 the Laborers and the UA signed a jurisdictional agreement purportedly settling these disputes and establishing the respective jurisdictions in these areas. However, in July of 1985 the Laborers informed the UA that they were cancelling this agreement. *This termination was upheld in arbitration*, as a consequence of which the jurisdictional dispute resumed. More specifically, the *dispute became focused on the construction of water treatment, wastewater treatment and water reclamation plants and pumping stations related to those facilities*. The UA's position was that, inasmuch as these projects involve large volumes of pipefitting work which had traditionally been performed by workers affiliated with the UA, its union's workers should be employed at these facilities and at rates established under UA collective bargaining agreements.

"Matters apparently reached something of a boiling point in the years 1987 and 1988 when the cities of Benicia and Vacaville awarded contracts for construction of water treatment plants to contractors employing laborers rather than UA workers. These contractors assigned work which the UA regarded as 'pipefitting work' to laborers whose wage rate was approximately $10.00

> per hour less than the comparable UA wage rate. . . . As the UA states it then decided to 'fight fire with fire;' one of its local affiliates created a 'craft tender' employee classification to represent 'unskilled' construction workers similar to employees affiliated with the Laborers throughout Northern California. . . . The controversy festered through the remainder of 1990, all of 1991 and into early 1992. Earlier in that year, the UA and the Laborers began trying again to solve their jurisdictional differences.
>
> "These efforts led to an April 30, 1992 meeting between two UA representatives and respondent Aubry and some of its subordinates of the DIR. . . . In any event, in early May of 1992 negotiators for the two unions met several times in an attempt to finalize an agreement." [Emphasis supplied]

41 Cal.App.4th 1458-60.

The Court of Appeals' opinion goes on to recount further disputes between the LIUNA, NCDCL and the UA, culminating in the UA's failed effort to force the California Department of Industrial Relations to publish a jurisdictional agreement which the LIUNA and the NCDCL have disavowed. 41 Cal.App.4th 1460-61. Having lost in the State Court of Appeals, the UA's next strategy was to initiate a series of federal False Claims Act suits in an effort to frighten contractors using construction laborers on wastewater treatment plant work to sign bargaining agreements with the UA. Doyle Williams, one of the named plaintiffs in the *Dan Caputo* case cited *infra*,

admitted this organizational objective during sworn deposition testimony in *U.A. 342 Joint Labor-Management Cooperation Committee, Inc., et al. v. Albay Construction Co., et al.*, (USDC Case No. C-96-0057 FMS).

> "Q [By Mr. Orenstein]: Mr. Williams, could you tell me in your own words why the False Claims actions were pursued by McCarthy, Johnson & Miller?
>
> "A [By Doyle William]: Because we had attempted to get these contractors to hire our people to do our work and I'm talking about Peter Kiewit, and they were hiring other people like carpenters, millwrights, laborers and they were performing our work. So one day we had reached our rope's end in trying to go through the prevailing wage and everything. And I said, 'Is there anything else we can do, Jack?' and he said, 'Let's try the False Claims element.' And he explained the False Claims procedure and I said 'Let's go for it.' And it was successful against Kiewit, and it seems to be successful against the others because we have been having settlement conferences."

As the foregoing demonstrates, the present action is, in reality, a labor dispute. It has nothing whatsoever to do with "false claims" of the type traditionally litigated pursuant to the provisions of the federal False Claims Act. Unrebutted evidence submitted to the trial court shows that the LIUNA and the NCDCL aggressively and actively claim the right to perform construction piping work also claimed

by the UA. Defendant C. W. Roen Construction Co., the principal petitioner herein, is signatory to a collective bargaining agreement with the NCDCL, but has no agreement with the UA. Unrebutted declaration testimony submitted to the trial court showed that Roen would have exposed itself to a breach of contract claim by the NCDCL if it had assigned the disputed work to UA members.

C. LEGAL BASIS OF PLAINTIFFS' CLAIMS

The False Claims Amendments Act of 1986, amending the civil False Claims Act, 31 U.S.C. §§ 3729-3733, restored provisions permitting private parties to bring "*qui tam*" actions to recover damages for "false claims" against "any person" who "knowingly presents, or causes to be presented" a false or fraudulent claim for payment on federally funded work; see 31 U.S.C. § 3729(a)(1). The amended Act defines a "claim" to include "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, a grantee, or other recipient if the United States government provides any portion of the money or property which is requested or demanded . . .." 31 U.S.C. § 3729(c).[2]

Qui tam actions are filed under seal until the United States decides whether to proceed with the case; see 31 U.S.C. § 3730(b)(2). The United States has the option of proceeding itself with the action or notifying the Court that

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[2]The term "*qui tam*" action derives from the Latin phrase "qui tam pro domino rege quam pro sic ipso in hoc parte sequitur," which means "who brings the action for the king as well as for himself." W. Blackstone, Commentaries on the Law of England 160 (1768), quoted in *United States ex rel. Erickson v. American Institute of Biological Sciences*, 716 F.Supp. 908 (E.D. Va. 1989).

it declines to pursue the action "in which case the person bringing the action shall have the right to conduct the action." 31 U.S.C. § 3730(d)(4)(B). If the United States declines to proceed with the action, and if the *qui tam* plaintiff (termed a "relator") obtains a damages judgment, the *qui tam* relator is entitled to receive a portion of the damages fixed by the Court, which shall be not less than 25% nor more than 30% of the proceeds of the action; see 31 U.S.C. § 3730(d)(2).

A relator can prevail on a False Claims Act claim only if it can demonstrate that the defendant *knowingly* made a "false" claim. See *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991) ["What is crucial -- and what must be proven at trial -- is that the water agency *knew that the information was false*. The statute emphasizes that the Act, for which the civil claim may be filed is to 'knowingly' present or cause to be presented 'a false or fraudulent claim,' 31 U.S.C. § 3729(a)(1), or to 'knowingly' make, use or cause a false record or statement to be made to get a false or fraudulent claim paid, *Id.* (a)(2) or to 'knowingly' make, use or cause a false record or statement to be made to 'decrease an obligation to pay the government.'"] 929 F.2d at 1416]. [Emphasis in original] The *Hagood* opinion goes on to note:

> "Innocent mistake is a defense to the criminal charge or civil complaint; so is mere negligence. The statutory definition of 'knowingly' requires at least 'deliberate ignorance' or 'reckless disregard.' To take advantage of a *disputed legal question*, as *may have happened here, is to be neither*

> *deliberately ignorant nor recklessly disregardful.*" [Emphasis supplied] 929 F.2d at 1421.

The present case represents a significant departure from previous appellate precedents in the Ninth Circuit and elsewhere which grapple with the issue of "knowing" falsity. (See discussion, *infra*)

D. HISTORY OF THE ACTION

Appellants filed this action in the U.S. District Court of the Northern District of California on or about August 10, 1996; the action was filed under seal, pending a determination by the United States with regard to whether it would participate in the suit. As in the UA's other False Claims Act suits, the United States subsequently declined to participate.

The suit alleges generally that petitioner C. W. Roen Construction Co. ("Roen") entered into a contract with the City of Santa Rosa for the construction of a federally financed construction project, known as the Laguna Wastewater Treatment Plant Improvements Project, for the sum of approximately $23,694,000. (Complaint, ¶ 9) The suit recites that project contract documents issued by the City of Santa Rosa require that Roen comply with the applicable U.S. Department of Labor general wage determinations (¶ 10) and pay prevailing wages on the project. (*Id.*)

Plaintiffs allege that defendants made claims for payment pursuant to the project construction contract; these payment applications required that Roen submit weekly payroll reports and statements of compliance representing that it had

complied with prevailing wage and fringe benefit obligations. (¶ 12) Plaintiffs allege that the statements filed by Roen were false "in that defendants have claimed that their employees installing certain piping, including mechanical, pressure, process, soil, waste, vent, potable and non-potable water piping have performed work within a labor or wage rate classification as construction laborers;" (¶ 14). Plaintiffs contend that such work should properly have been assigned to plumbers and steamfitters.[3] (*Id.*) As a result of the alleged misclassification of work, plaintiffs allege that C. W. Roen Construction Co. underpaid employees on the project by approximately $699,675.20. (¶ 19) Pursuant to the provisions of the False Claims Act, plaintiffs seek to recover treble damages and penalties totaling in excess of $2 million, together with all costs and attorneys' fees. (¶¶ 26-27)

Defendants answered the complaint, denying any liability, and moved for summary judgment.

After briefing and argument, the trial court entered an order on September 16, 1997 granting defendants' motion for summary judgment and denying certain other relief sought by the plaintiffs. The trial court found that the plaintiffs could not demonstrate that the defendants had submitted knowingly false claims. The Court stated:

> "Plaintiffs' attempt to use the False Claims Act as a vehicle for resolving a classification dispute — which is at least related to, if not

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[3]As noted elsewhere in the petition, there is no Department of Labor job classification or prevailing wage determination for Sonoma County covering the period of the project construction.

> wholly reflective of, a territorial dispute between different unions — fails due to the FCA's scienter requirement: plaintiffs are unable to show that defendants knew of an intentional misclassification in their payroll records."

The Court held that summary judgment should be "granted because this Court concludes that no reasonable juror could find the defendants' scienter rose to the level required by the False Claims Act." The Court further found that there was no "reason to stay or defer this action pending Department of Labor review, since later classification decisions would not retroactively 'falsify' prior filings."

In a 2-1 decision, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded the action; *U.S. ex rel. Plumbers and Steamfitters Local No. 38, et al. v. C.W. Roen Construction Co.*, 183 F.3d 1088 (1999). The Court found that Roen was on notice of a 1994 letter issued by the Department of Labor (and forwarded to Roen by the UA) supporting the pipefitters' claim to jurisdiction over the challenged work; 183 F.3d at 1090-91. The Court acknowledged that an earlier jurisdictional agreement between the LIUNA and the Pipefitters (which would have allocated the disputed work to the UA) had been declared rescinded by the LIUNA *before* Roen began work on the Laguna Wastewater Treatment Project, but noted that the Department of Labor did not take cognizance of the rescission until 1997; 183 F.3d at 1091. The Court held that Roen's wage and fringe benefit certifications "may have risen to the level of 'deliberate ignorance' or 'reckless disregard'" because Roen was on notice that the UA claimed

the disputed work when it certified that it met prevailing wage requirements on the subject job. *Id.*

The Ninth Circuit opinion admits that the Department of Labor ultimately withdrew its determination that the disputed work belonged to the UA, and that the DOL concluded that job classifications could not be enforced absent a Department of Labor "area practice survey." 183 F.3d at 1091. The opinion acknowledges that "it is undisputed that no such area practice survey has been completed, and the record suggests that the Department of Labor has now decided not to conduct such a survey." *Id.* Nevertheless, the panel majority ruled that Roen might be civilly liable for making a "false claim."

In dissent, Judge Silverman noted that the evidence offered by the relators is insufficient to meet the scienter requirements under the False Claims Act:

> "'For a qui tam action to survive summary judgment, the relator must produce sufficient evidence to support an inference of *knowing fraud*.' *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (emphasis added) (*quoting United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995)). As we said in *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992):
>
> > The weakest account of the act's 'requisite intent' is the 'knowing presentation of what is known to be false.' Citing *Hagood, supra*, 929 F.2d at 1421. The phrase 'known to

> be false' in that sentence does not mean 'scientifically untrue'; it means 'a lie.'
>
> "This is especially true in a False Claims Act case presented on a false certification. In *Hopper*, we specifically held, 'For a certified statement to be 'false' under the Act, it must be an intentional, palpable lie.' *Hopper*, 91 F.3d at 1267."[4]

183 F.3d at 1095-96.

The dissent tartly notes that "if anything is out of context, it is the attempt to apply the False Claims Act to the

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[4]As the dissent stated:

> "It is undisputed that at the time Roen submitted its first certification, both the Laborers and the Plumbers claimed jurisdiction over the piping work at the Laguna project. Two years earlier, prior to the commencement of the job, the Plumbers and the Laborers had a jurisdictional agreement regarding the type of work in issue. The two unions had agreed that it was Plumbers' work. It is undisputed that before Roen ever filed its first allegedly fraudulent certification, the Laborers rescinded the agreement and claimed the work as their own. The majority makes much of the 1994 letter from the Department of Labor. The problem with the letter is that it is specifically premised on the existence of the Plumbers-Laborers agreement, the very agreement that the Laborers rescinded before the Laguna job began." 183 F.3d at 1095.

resolution of a jurisdictional dispute between two unions, especially when one of the unions is not even a party to the lawsuit." *Id.*

V.

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in holding that the *qui tam* relators (a labor union and its principal officer) could state a claim under the federal False Claims Act, 31 U.S.C. Section 3729, *et seq.*, against a contractor for allegedly "knowingly" submitting false claims by executing certified payrolls that report (truthfully) that pressure piping work on federally financed construction was performed by Construction Laborers, rather than Pipefitter members of the relator union. Unrebutted evidence in the record shows that this work is the subject of an ongoing jurisdictional dispute between the Construction Laborers and the Pipefitters; the contractor is signatory to an agreement with the Construction Laborers and has no agreement with the Pipefitters. Its certified payrolls, which did not misrepresent the wages and fringe benefits paid to any workmen, merely reflected the contractor's decision to give the disputed work to members of one of two unions that claim the work for their membership. The payroll certifications cannot, under any reasonable analysis of the federal False Claims Act, be considered "knowing" misrepresentations or claims submitted in "reckless disregard" of the truth.

The unrebutted record evidence shows that the U.S. Department of Labor has never made a prevailing wage determination or a job classification determination for

pressure pipe work in Sonoma County during the period in which the disputed construction was performed.

2. The Ninth Circuit's 2-1 decision, which charges the trial court with the responsibility for determining "prevailing wages" and job classifications in Sonoma County during the period in which the disputed work was performed, transforms the trial court into a *de facto* administrative agency, and requires the Court to make administrative findings which will have an impact on contractors and workmen who are unrepresented in these proceedings. The trial court has neither the resources nor the competence to conduct an administrative survey such as the Department of Labor is empowered to undertake to determine prevailing wages and job classifications. The Ninth Circuit's decision totally disregards the distinction between the traditional functions of administrative agencies and the limited functions of trial courts.

3. The Ninth Circuit's opinion also utterly disregards the fact that the *qui tam* relators have failed to demonstrate how the United States was damaged *in any way* by the award of the disputed work to Construction Laborers rather than Pipefitters. No one disputes that the construction work which was the subject of this action has been completed, and the relators have *not urged* that the petitioners misstated the amount of wages or fringe benefits which were paid on the job. Though the relators contend the petitioners erred by awarding covered construction work to Construction Laborers instead of Pipefitters, they do not explain how the alleged misclassification could possibly have damaged the United States, or created any claim against the contractor for recovery of any monies, since it is now beyond dispute that no prevailing wage or job classification determination has been made for the work in question.

4. Finally, the panel majority fails to explain how petitioners could be guilty of asserting a "false claim" when the majority, the dissent and all of the litigants agree that the now-superceded DOL letters described in the panel majority's opinion are *now withdrawn*. 183 F.3d at 1091. How can a party be guilty of a "false claim" based upon an erroneous administrative ruling which is now inoperative? The panel majority does not explain.

VI.

REASONS THE PETITION SHOULD BE GRANTED

A. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO CLARIFY THE "SCIENTER" REQUIREMENT FOR SUSTAINING A CLAIM UNDER THE CIVIL FALSE CLAIMS ACT

The False Claims Act, 31 U.S.C. Section 3729, *et seq.*, imposes liability upon parties who "knowingly" present a "false or fraudulent claim" for payment on federally financed work; see 31 U.S.C. Section 3729(a)(2). The Act defines "knowingly" as including "actual knowledge" of falsity, and acts "in deliberate ignorance of the truth or falsity of the information" or "in reckless disregard of the truth or falsity of the information." 31 U.S.C. Section 3729(b)(1)-(3).

The lower courts have struggled with the definition of "knowingly" with uncertain and inconsistent results. Ninth Circuit cases prior to the present action suggested a far higher standard for liability than the present 2-1 opinion supports:

> "For a qui tam action to survive summary judgment, the relator must produce sufficient evidence to support an inference of '*knowing fraud.*' *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1995) (emphasis added) (*quoting United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995))."

In an earlier decision, the Circuit held: "The weakest account of the act's 'requisite intent' is the 'knowing presentation of what is known to be false.'" *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992), *quoting Hagood v. Sonoma County Water Agency*, 929 F.2d 1412, 1421 (9th Cir. 1991). See also *U.S. ex rel. Reuter v. Sparks*, 939 F.Supp. 636 (C.D. Ill. 1996), *aff'd.* 111 F.3d 133 (7th Cir. 1997); *U.S. ex rel. Butler v. Hughes Helicopter*, 71 F.3d 321 (9th Cir. 1995); *U.S. ex rel. Milam University of California*, 912 F.Supp. 868 (D. Md. 1995). As the majority acknowledges "mere negligence and 'innocent mistake' are not sufficient to establish liability under the FCA." 183 F.3d at 1092, *citing U.S. ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998). But here the Ninth Circuit holds that a contractor may "knowingly" make a "false claim" when it chooses to award contested work to one of two competing construction crafts and thereafter certifies that it has complied with job classification and prevailing wage requirements. 183 F.3d at 1093.[5] No other court has reached such a result. Two

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[5]The Ninth Circuit panel majority seems to believe that Roen should have undertaken the expense of initiating *its own* administrative proceeding to resolve the dispute between the Construction Laborers and

(continued)

lower court opinions hold that where, as here, there has been no valid Department of Labor prevailing wage determination, no False Claims Act suit will lie.

In *U.S. ex rel. Windsor v. DynCorp, Inc.*, 895 F.Supp. 844, a case strikingly similar to this action, a *qui tam* relator alleged that DynCorp had violated the Davis-Bacon Act, 40 U.S.C. Section 276a because "DynCorp in certain instances misclassified workers, and the wages paid were therefore legally deficient." 895 F.Supp. at 849. Like the plaintiffs in the present action, Windsor sought to prove his case by introducing an expert affidavit asserting "that at times, DynCorp's employees were classified as 'Laborers', where under Department of Labor policy regarding the work they were performing, they should have been placed into one of the many subclasses for skilled mechanics, such as 'Electrician' or 'Carpenter.'" 895 F.Supp. at 849.

The court granted summary judgment to the contractor on the misclassification claims, finding that "it is impossible to determine whether DynCorp submitted a false claim to the government *without first determining whether DynCorp actually misclassified an employee in a given instance*. And, the responsibility for resolving such disputes rests *not with the courts, but with the Department of Labor*." 895 F.Supp. at 851. [Emphasis supplied] The court noted that:

(fn. continued)
the Pipefitters. 183 F.3d at 1094. Of course, the dispute has been festering for two decades, with no resolution in sight. Is it practical or reasonable to require a contractor to undertake to resolve this inter-union issue? And what wages should the contractor pay while the dispute remains unresolved?

"Under labor regulations, the contracting agency is responsible for investigating a contractor's compliance with the Davis-Bacon Act by performing confidential interviews with employees and examining payroll data. 29 C.F.R. § 5.6(a)(3). And, in inspecting the payroll documents, the contracting agency is directed to take 'particular care . . . to determine the correctness of classifications and to determine whether there is a disproportionate employment of laborers and of apprentices or trainees.' *Id.* Upon a recommendation by the contracting agency, or on its own initiative, the Department of Labor may choose to conduct a further investigation, following which it will issue findings. 29 C.F.R. § 5.6(b).

"Importantly, the regulations provide that disputes over the proper classification of workers *must* be resolved according to the regulatory procedures set forth. [citing *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 761, 101 S.Ct. 1451, 1457, stating that '[d]isputes over the proper classification of workers under a contract containing Davis-Bacon provisions must be referred to the Secretary for determination'] . . . In sum, a Davis-Bacon Act worker classification dispute, by itself, is not an FCA claim because such disputes must be resolved by the Department of Labor." *Id.*

The same reasoning was adopted by the trial court in dismissing a similar FCA claim in *U.S. ex rel. IBEW v. G. E. Chen Construction*, 954 F.Supp. 195, 197 (N.D. Cal. 1997); see also, *Davis v. Hardaway Construction Co.*, 239 Ark. 1, 386 S.W.2d 707 (1965) [Davis-Bacon Act dispute regarding classification of workers as mechanics or as mechanics' helpers must be referred to Secretary of Labor for determination]. See also, *Carabetta Enterprises v. Harris*, 24 Wage & Hour Cas. (BNA) 398, 1979 WL 1907 (D.D.C. 1979) [DOL resolution of classification dispute not subject to judicial review]. The *Davis* and *Carabetta* cases are cited with approval in *DynCorp, supra.*

In the present case, the Court has an opportunity to address the "scienter" issue based on a trial court record which contains unrebutted evidence of competing legitimate claims to the construction work which is the basis for the alleged "false claim." This factual record gives the Court an opportunity to provide the lower courts with guidance about the "scienter" requirement in a case in which the factual predicate for its holding would not be in dispute.

B. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT HAS DIRECTED THE TRIAL COURT TO ACT AS A *DE FACTO* ADMINISTRATIVE AGENCY

The most disturbing aspect of the Ninth Circuit's decision is the holding that the trial court is empowered to make administrative determinations regarding prevailing wages and job classifications on federally funded work in the absence of a Department of Labor survey and appropriate

administrative findings. The panel majority holds that the decision of the Labor Department Wage Appeals Board in *Matter of Fry Bros. Corp.*, 123 WAB No. 76-6 (1977), would support a trial court determination of prevailing wages and job classifications based on a review of area collective bargaining agreements. 183 F.3d at 1093.

The panel majority ignores the fact that *Fry Bros. itself* was based on a Department of Labor administrative finding of prevailing wages; there is not a word in *Fry Bros.* which suggests that a trial court should appropriate this administrative function for itself.

Inexplicably, the panel majority opinion departs from the Ninth Circuit's own recent decision in *U.S. ex rel. Plumbers and Steamfitters v. Dan Caputo Co.*, 152 F.3d 1060 (9th Cir. 1998), in which the Court *agreed* that job classification determinations are within the primary jurisdiction of the Department of Labor. The Court noted:

> "On the issue of deference we agree with the District Court *that the Department should in the first instance determine how a particular type of work is classified* for the purposes of wage determinations. Regulations under the Davis-Bacon Act set forth procedures for the administrative resolution of classification disputes. See 39 CFR §§ 5.6(a)(3) and 5.11. *Accordingly, deferral to the Department with respect to classification determinations is proper under the doctrine of primary jurisdiction.* See *U.S. ex rel. Windsor v. DynCorp, Inc.*, 895 F.Supp. 844, 852 (E.D. Va. 1995). [quotation omitted] Once the final ruling is made on whether a prevailing

> practice exists, or *how the work at issue should properly be classified*, however, we do not believe it is necessary for the District Court to defer to the Department on whether the contractors misclassified their employees." [Emphasis supplied] 152 F.3d at 1061.[6]

The language of the Ninth Circuit in *Dan Caputo* makes it absolutely clear that both the determination of prevailing wages *and* of the standards for work classification are to be

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[6]The doctrine of primary jurisdiction applies "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64, 77 S.Ct. 161, 165 (1956). Neither the court nor the parties are at liberty to waive the application of the doctrine; *see Red Leg Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) ["We realize that neither party has raised the issue of primary jurisdiction up to this point. It is well established, however, that its invocation cannot be waived by the failure of the parties to argue it ...."]. The Ninth Circuit has recognized that the trial court has *no discretion* with regard to application of the primary jurisdiction doctrine. In *U.S. v. General Dynamics Corp.*, 828 F.2d 1356 (1987), this court stated:

> "This District Court apparently thought that there is an element of discretion in the use of the primary jurisdiction doctrine ..... As we read the cases, however, an issue either is within an agency's primary jurisdiction or it is not, and, if it is, a court may not act until the agency has made the initial determination. *Failure to defer when the doctrine so mandates is reversible error.*" [Emphasis supplied] 828 F.2d at 1364, fn. 15.

made, in the first instance, by the Department of Labor. Once the prevailing wage and work classification determinations have been made on a generic basis, the trial court has the ability to apply those standards to the specific work at issue, and determine whether a misclassification has been made *on specific work*.

In this case, the evidence is unrebutted that the DOL has *not* made work classification determinations which would resolve the issue of whether federally funded work in Sonoma County (during the period in question) was predominantly work performed by construction laborers or by pipefitters.

This Court has long recognized that there are fundamental differences between agency proceedings (except where the agency is acting in a quasi-adjudicative capacity) and court proceedings. Agencies have the power to conduct investigations and promulgate broad rules which may apply across a whole class of interested parties. According to the unrebutted declaration of Richard Cheung, submitted in support of defendants' motion for summary judgment in the trial court:

> "The Wage and Hour Division of the Department of Labor is solely responsible for determining prevailing wages to be paid for work classification under the Davis-Bacon Act. ... *The Department of Labor is the only entity which can make that determination*, pursuant to 40 U.S.C. Section 267(a). ...
>
> "The Department of Labor does not 'establish' prevailing wage practice simply by declaring that certain wages are prevailing

> for certain classes of work. Instead, the Department must determine what the prevailing practice is, usually through surveys of projects of a similar nature in the same county for the 12 months preceding the start of the contract. Sometimes, even with a survey, no single practice is found to be prevailing. We focus on local areas, and a finding of prevailing practice in one county may or may not be applicable to another county." (Cheung Declaration, ¶¶ 3-4)

Courts typically make factual findings and apply legal principles to determine whether specifically identified plaintiffs are entitled to relief against specifically identified defendants. Such disputes are appropriate for determination by a trial court because the interests of all the parties are represented in the courtroom. An example of the difference between adjudicative and administrative functions can be seen in the recognition that "administrative agencies have the power, which is not granted to the judiciary, to conduct investigations." 2 Am.Jur.2d, "Administrative Law," Section 122, *citing United States v. Morton Salt Co.*, 303 U.S. 632, 70 S.Ct. 357 (1950); and see *Commissioner of Insurance v. North Carolina Rate Bureau*, 269 S.E.2d 547 (N.C. 1962). Agencies are given investigative authority precisely because they can promulgate broad rules applicable to many parties; see *United States v. Morton Salt Co.*, *supra*.

By inviting the trial court to use the "Fry Bros." method to make wage and job classification determinations, the Circuit majority is asking the lower court to become a *de facto* administrative agency with broad ranging investigative powers, and the ability to promulgate wage and job classification determinations which are beyond its

competence, and which could prejudice the rights and interests of parties that are unrepresented in this litigation.

Other courts have recognized that a trial court may not proceed with a "false claim" suit based on alleged misclassification of employees absent a Department of Labor determination of the proper job classifications and prevailing wages; see *U.S. ex rel. Plumbers and Steamfitters v. Dan Caputo Co.*, 152 F.3d 1060 (9th Cir. 1998), discussed *supra*, [error to dismiss action, but action stayed pending issuance of DOL classification determinations]; *U.S. ex rel. Windsor v. DynCorp, Inc.*, 895 F.Supp. 844 (E.D. Va. 1995), [no suit under the False Claims Act will lie in the absence of a Department of Labor determination of the proper job classifications and prevailing wages]. In the present case, the panel majority notes that the Department of Labor apparently has no intention of proceeding with a wage survey in Sonoma County for the period in question. 183 F.3d 1091. Instead, the panel majority seems to believe that the *trial court itself* can carry out the administrative functions traditionally undertaken by the Department of Labor. Nothing in the Davis-Bacon Act nor in the regulations promulgated pursuant thereto contemplate any such action by a trial court.

The Court suggests that the trial court look to collective bargaining agreements in existence at the time the disputed work was performed to make a prevailing wage and job classification determination. 183 F.3d at 1094. But the Court offers no explanation whatsoever with regard to how the trial court ought to proceed. Simply reviewing collective bargaining agreements in existence during the 1994-1997 period will not tell the Court whether the wage and fringe benefit requirements of any specific agreement are "prevailing" in the area at issue. How is the Court to go

about determining what practice is "prevailing"? Will the Court conduct its own survey? Will the Court require the parties to undertake a survey? How will the Court deal with the fact that its administrative determination of "prevailing wages" will affect potentially hundreds of other employers and hundreds of union members who have no representation in the present case?

This Court should grant certiorari to rule that it is inappropriate for trial courts to conduct administrative inquiries into prevailing wages, job classifications and other administrative issues which may affect hundreds of unrepresented parties and which are the province of the Department of Labor; see *U.S. ex rel. Windsor v. DynCorp, Inc.*, 895 F.Supp. 844, 851 (E.D. Va. 1995).

C. AS A MATTER OF LAW, THERE CAN BE NO ACTIONABLE "FALSE CLAIM" BECAUSE THE DEPARTMENT OF LABOR HAS NOW ADMITTED THAT THE 1994 WORK ALLOCATION LETTER ON WHICH THE "FALSE CLAIM" ACTION IS PREMISED WAS ERRONEOUS

As noted above, the Declaration of Richard Cheung of the U.S. Department of Labor, which is unrebutted in the trial court record, established that the 1994 and 1996 letters confirming a work allocation agreement between the UA

and the NCDCL were issued in error. (See discussion, *supra*, and see Cheung Declaration, ¶¶ 5-6)[7]

The Court of Appeals panel majority does not explain how a claimant can be liable for making a "false" claim when the factual predicate for establishing falsity has been removed. The record now clearly shows that there is no U.S. Department of Labor wage and job classification determination for Sonoma County for the period in which the work in dispute was performed. The panel majority admits this, but states that it is irrelevant because the DOL letter disavowing its previous findings was not issued until *after* Roen performed the disputed work. 183 F.3d at 1094. ["This letter adds no support, however, to the District Court's conclusion that the Department's efforts to resolve the classification issue were 'uncertain,' because the 1997 letter was sent after the period charged in the Complaint." *Id.*] This reasoning ignores the unvarnished fact that no false

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[7]Mr. Cheung declared that a DOL letter purporting to confirm a work allocation agreement between the UA and the NCDCL "was issued in error, as we did not confirm that the agreement between the unions was in fact followed ...." Mr. Cheung went on to declare that the letter "was erroneous, and the DOL could not establish an actual prevailing wage or prevailing practice without an actual area practice survey." (Cheung Declaration, ¶¶ 5-6) Mr. Cheung went on to state that "I have met with Mr. Bruce Roen and other employers regarding public works subject to the Davis-Bacon Act in Sonoma County. They asked how they could determine what wage must be paid for various classifications on this or other projects subject to the Davis-Bacon Act. DOL has not conducted any prevailing practice survey or made any applicable findings regarding prevailing practices for wastewater treatment plants in Sonoma County." (Cheung Declaration, ¶ 8) The respondents did not file any evidence contradicting Mr. Cheung's declaration testimony. Mr. Cheung's declaration is neither acknowledged nor discussed in the panel majority's opinion.

claim could have been made *in the first instance* regarding the payment of prevailing wages unless there was a valid Department of Labor determination of prevailing wage rates. The Court of Appeals seems to suggest that we should blind ourselves to the fact that we *now know* that no such valid determination ever existed. The panel majority appears to say that Roen *should have thought* such a determination existed in 1994 (based on the 1994 DOL letter) and therefore may now be liable for submitting a false claim based on the erroneous information given to Roen by the UA in 1994. This reasoning exalts form over substance and creates civil liability where no civil violation has occurred. Could an individual be liable for commission of a crime because he/she *thought* a crime was committed, even though the conduct in question was not actually illegal? The answer seems obvious.

VII.

CONCLUSION

For the reasons set forth herein, the Court should grant certiorari in the within action.

Dated: October 6, 1999

Respectfully submitted,

STANTON, KAY & WATSON, LLP

By: JAMES P. WATSON
Counsel of Record for Petitioners

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 38 and LAWRENCE J. MAZZOLA,

Plaintiffs-Appellants,

v.

C.W. ROEN CONSTRUCTION CO.; BRUCE A. ROEN; and JERALDINE C. BREAULT,

Defendants-Appellees.

No. 97-17204

D.C. No. CV-96-02976-SI

OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted
April 13, 1999—San Francisco, California

Filed July 13, 1999

Before: Mary M. Schroeder, Stephen Reinhardt, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Silverman

COUNSEL

John J. Davis, Jr., McCarthy, Johnson, & Miller, San Francisco, California, for the plaintiffs-appellants.

James P. Watson, Stanton, Kay & Watson, San Francisco, California, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

In this qui tam action, Plumbers and Steamfitters Local No. 38 alleges that C.W. Roen Construction Company and its president and office manager violated the False Claims Act (FCA), 31 U.S.C. §§ 3729-33, by certifying falsely that the Company had paid the applicable prevailing wage as required

by the Davis-Bacon Act and related federal laws, when in fact it had paid its employees at a lower rate. The district court found that because the Department of Labor had not conducted an area practice survey for the area in question, and because the Department's other efforts to establish the prevailing wage were "uncertain," no reasonable juror could find that the defendants acted with the scienter necessary to violate the FCA. The court then granted summary judgment for the defendants. We conclude, however, that an area practice survey is not necessary in all cases to establish the prevailing wage, and that the status of the Department of Labor's determinations did not compel the conclusion that the plaintiffs could under no circumstances prove that the defendants acted with the requisite scienter. Given these determinations, and the presence of complex legal and factual issues that are not resolvable on the current state of the record, we hold that the district court erred in granting summary judgment to the defendants. We therefore reverse and remand for further proceedings.

Background

On September 1, 1994, C.W. Roen Construction Company entered into a construction contract with the City of Santa Rosa, California, to make improvements to the Laguna Wastewater Treatment Plant. (ER 158). The Laguna Plant was a federally funded project, and hence subject to the prevailing wage and reporting requirements set forth in the Davis-Bacon Act, 40 U.S.C. §§ 276a, *et seq.*, and the Copeland Anti-Kickback Act, 40 U.S.C. § 276c. These statutes required Roen to pay its workers prevailing wages, and to submit weekly statements reflecting the wages it paid. *See* 40 U.S.C. § 276a & 276c. Under federal law, Roen was also required to certify its payments of the applicable wage rates. Under the relevant regulations:

> Each payroll submitted [to the Department of Labor] shall be accompanied by a "Statement of Compli-

> ance," signed by the contractor or subcontractor or his her or agent who pays or supervises the payment of persons employed under the contract and shall certify the following:
>
> . . .
>
> (3) That each laborer or mechanic has been paid not less than the applicable wage rates . . . .

29 CFR § 5.5(a)(3)(ii)(B). The regulations also dictate that:

> (D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under . . . section 231 of title 31 of the United States Code [The False Claims Act].

29 C.F.R. § 5.5(a)(3)(ii)(D). It is undisputed that Roen did submit the certifications as required by federal law. The plaintiffs allege, however, that Roen's certifications amounted to false statements because the Company paid employees performing certain types of work less than the prevailing wage rate.

At issue in this case is the classification and payment of workers who performed certain types of piping work on the Laguna project (namely "mechanical, pressure, process, soil, waste, vent, potable, and non-potable water piping" (Complaint ¶ 14, ER 4)) between August 15, 1994 and February 1997. Roen classified workers who performed this piping work as Laborers, and paid them at the Laborer wage rate. It then certified that it was paying these workers the appropriate wage rates under Davis-Bacon. The plaintiffs claim that Roen thereby misclassified these workers; according to the plaintiffs, all workers who perform this type of piping work on wastewater treatment plants in Northern California must, under Davis-Bacon, be classified as Plumbers & Steamfitters

and paid at the higher Plumbers & Steamfitters wage rate. The plaintiffs argue that as a result of misclassifying and underpaying the workers, Roen violated the FCA.

The plaintiffs point out that in May 1992, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, AFL CIO, Pipe Trades District Council No. 51 (UA) and the Northern California District Council of Laborers signed a jurisdictional agreement (1992 Agreement) that resolved the classification of piping workers on Northern California water treatment plant projects. According to the 1992 Agreement:

> [i]n the construction of water treatment plants, wastewater (i.e., sewage) treatment plants, water reclamation plants, and all pumping facilities related to such plants, for work performed both inside and outside of buildings, the prevailing rate of per diem wages established for Plumber-Steamfitter-Pipefitter is paid to those employess who perform all piping work of every description and material (except as noted in paragraph 2), including but not limited to . . . all process piping, soil, waste, vent, . . . domestic and process water piping, . . . all mechanical process equipment.

(ER 4). Paragraph 2 of the 1992 Agreement states that "[t]he prevailing rate of per diem wages established for Laborers is paid to those employees who, on the facilities decribed above, perform the installation of non-pressurized surface and storm drain piping . . . ." (ER 40). That is, according to the 1992 Agreement, the workers who performed the piping work at issue in this case (again, "mechanical, pressure, process, soil, waste, vent, potable, and non-potable water piping" (Complaint ¶ 14, ER 4)) were classified as Plumber-Steamfitter-Pipefitters.

In January 1994, the District Director of the U.S. Department of Labor's Wage and Hour Division, Frank Conte,

determined that the 1992 Agreement between the Plumbers and the Laborers established the appropriate classifications and wages for work done on water treatment plants in Northern California. In a letter to John Davis, counsel for the Plumbers and Steamfitters Local 38, the District Director wrote that:

> As of September, 1992, the agreement [between Northern Californi District Council of Laborers and Pipe Trades District Council No. 51] establishes the prevailing practice in Northern California for the construction of water treatment plants, wastewater treatment plants, water reclamation plants and all pumping facilities related to such plants in Northern California. For contracts for the construction of such plants awarded after September, 1992 and subject to Davis-Bacon and Related Acts the Wage and Hour Division will require the payment of prevailing wages in accordance with the agreement.

(ER 39). In July 1994, Davis sent a copy of the District Director's 1994 letter to Roen Construction, putting Roen on notice of the Wage and Hour Division's determination that the relevant wage rate and job classifications would be derived from the 1992 Agreement. (ER 36-40).

In June 1994, the business manager of the Laborers District Council sent a letter to the UA purporting to terminate the 1992 Agreement that formed the basis of the original Conte letter. (ER 43). The UA, however, refused to accept the termination of the Agreement, and as far as the rather sparse record before us reflects, the Laborers took no further action to validate its position. In any event, in March 1996, nearly two years after the purported termination of the Agreement, Conte, along with Richard Cheung, a Labor Department Regional Wage Specialist, again wrote to Mr. Davis and reconfirmed the Department's earlier conclusion that the rele-

vant wage classifications were those set forth in the Agreement. In this letter, the District Director stated:

> The Wage and Hour Division has determined that the Agreement between Northern California District Council of Laborers and Pipe Trades District Council No. 51 . . . reflects a longstanding prevailing practice. The Department of Labor will therefore accept this Agreement as reflecting the prevailing practice.
>
> Accordingly, for contracts for the construction of such plants awarded after September, 1992 and subject to the Davis-Bacon and Related Acts, the Wage and Hour Division will require the payment of prevailing wages in accordance with the Agreement.

(ER 24). It does not appear that the Labor Department's 1996 letter was ever sent to Roen.

In March 1997, following the time period charged in the plaintiffs' False Claims Act complaint, the Labor Department sent Davis another letter. In this letter, signed by John Fraser, the Acting Administrator of the Wage and Hour Division, the Department stated that it had "reexamined [its] position regarding Wage and Hour Division's ability to enforce the 1992 jurisdictional agreement." (ER 27). The letter concluded that the Department was unable to enforce that agreement because "there are indications that the written agreement was not followed." (ER 27). In such circumstances, the letter stated, an area practice survey is required to determine the actual practice before classifications may be enforced. It is undisputed that no such area practice survey has been completed, and the record suggests that the Department of Labor has now decided not to conduct such a survey.

Analysis

[1] We first address a threshold question. In granting the defendants' motion for summary judgment, the district court

relied on the sole ground that "no reasonable juror could find that defendants' scienter rose to the level required by the False Claims Act." (ER 229). The court appears to have assumed, without deciding, that the FCA extends to false claims that an employer has paid the prevailing wage required by the Davis-Bacon Act. The district judge did comment, however, that "[o]ther courts have been hesitant to hear FCA claims based on the alleged misclassification of workers because of the Davis-Bacon Act's regulatory scheme," suggesting that the FCA might, in fact, not cover claims such as the one before us today. (ER 229; *citing United States ex rel. I.B.E.W. Local 217 v. G.E. Chen Construction, Inc.*, 954 F. Supp. 195 (N.D. Cal. 1997); *United States ex rel. Plumbers and Steamfitters Local 342 v. Dan Caputo Co.*, 1996 WL 400967 (N.D. Cal. 1996); *United States ex rel. Windsor v. DynCorp. Inc.*, 895 F. Supp. 844 (E.D. Va. 1995)). Contrary to such suggestion, the FCA does indeed extend to false statements regarding the payment of prevailing wages.

As we noted in *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996), "the archetypal *qui tam* FCA action is filed by an insider at a private company who discovers his employer has overcharged under a government contract." It is also true, however, that FCA actions may be sustained under different theories of liability, including "false certification." *See id.* (*citing United States v. Hibbs*, 568 F.2d 347 (3d Cir. 1977)). As we held in *Anton*, "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *Id.* (emphasis in original).

As shown above, in order to qualify for federal construction projects subject to Davis-Bacon and related Acts, contractors must "certify" that "each laborer or mechanic has been paid not less than the applicable wage rates." 29 CFR § 5.5(a)(3)(B)(*3*). Under *Anton*, therefore, if a contractor submits a false certification pursuant to this requirement he may be liable under the FCA. Moreover, the regulations governing

federal construction contracts make this perfectly clear. Those regulations state explicitly that "[t]he falsification of any [such] certification[ ] may subject the contractor to civil . . . prosecution under . . . section 231 of title 31 of the United States Code [The False Claims Act]." 29 CFR § 5.5(a)(3)(D).[1]

[2] We have no doubt, therefore, that a false certification that workers have been paid at the legally required wage rate may give rise to liability under the FCA. If, as the Plumbers allege, Roen and its president and office manager submitted such false certifications, it may be liable under the False Claims Act. *See Anton*, 91 F.3d at 1266.

[3] We turn now to the question of scienter. The False Claims Act imposes liability only on those who "knowingly" present a "false or fraudulent claim" to the government. *See* 31 U.S.C. § 3729(a)(1). Mere negligence and "innocent mistake[s]" are not sufficient to establish liability under the FCA. *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998). While some of our cases may contain extraneous comments that might be read out of context to suggest that the FCA requires an intentional lie to trigger liability, those cases almost invariably reiterate the controlling statutory language that is determinative of their outcome. As the FCA provides, to rise to the level of "knowing" presentation, all that is required is that the party:

> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or

[1]We also note that in *United States ex rel. Plumbers and Steamfitters Local No. 342 v. Dan Caputo Co.*, 152 F.3d 1060 (9th Cir. 1998), we reversed the district court's decision to dismiss an almost identical False Claims Act claim pending further action by the Department of Labor, and ordered that the action be reinstated and temporarily stayed.

> (3) acts in reckless disregard of the truth or falsity of the information,
>
> and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b). We have repeatedly emphasized this statutory language when describing the scienter requirement under the FCA. *See, e.g., Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996); *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). Thus, in order to be liable for an FCA violation, Roen's conduct need only qualify under one of the alternative statutory standards, such as "deliberate ignorance" or "reckless disregard".

The district court granted summary judgment to the defendants for two reasons. As the district court held:

> [The plaintiffs' claim] fails due to the FCA's scienter requirement: plaintiffs are unable to show that defendants knew of an intentional misclassification in their payroll records. This failure is inevitable given the uncertainty surrounding the Department of Labor's efforts to establish the classification relevant to this case and the undisputed fact that the Wage and Hour Division of the Department of Labor has not yet performed an area practice survey in Sonoma County to determine the actual classification practices there.

(ER 228). That is, the district court found summary judgment to be appropriate because (1) the Department of Labor had not conducted an area practice survey, and (2) the Department's other efforts to establish the prevailing wage were "uncertain." We disagree as to both reasons.

[4] Under Davis-Bacon, employers are required to pay prevailing wages to all employees on covered federal construc-

tion projects. The wage rate an employer must pay is determined in two steps: first, the employer must ascertain an employee's proper job classification; second, the employer must ascertain the prevailing wage rate for that job classification. By matching the rate to the classification, the appropriate wage is derived. Although area practice surveys are one way in which wage classifications may be established, they are not the only way. Over twenty years ago, the Labor Department's Wage Appeals Board decided *Matter of Fry Bros. Corp.*, 123 WAB No. 76-6, 1977 CCH Wages-Hours Administrative Rulings ¶ 31,113 at 42,757 (June 14, 1977). In *Fry Brothers*, the Department of Labor withheld funds from the contractor for underpayment of prevailing wages based on the misclassification of carpenters as laborers. *Id.* at 42758. The Assistant Secretary of the Employment Standards Administration upheld the withholding of funds. Because the prevailing wage determinations that had been issued by the Department of Labor reflected union negotiated rates, the Secretary concluded that job classifications for the disputed project would be based correspondingly on the union negotiated agreements. The contractor objected to this method of establishing prevailing job classifications, and thus the wage rate applicable to its employees. The Wage Appeals Board, however, affirmed the Secretary's decision. The Board held that where the Department determines that the prevailing wage rate for an area derives from a collectively bargaining agreement, then the job classifications for that area must also be derived from that agreement. As the Board wrote:

> When the Department of Labor determines that the prevailing wage for a particular craft derives from experience under negotiated agreements, the Labor Department has to see to it that the wage determinations carry along with them as fairly and fully as may be practicable, the classifications of work according to job content upon which the wage rates are based.

Id. at 42,762.

[5] There are two elements of the *Fry Brothers* decision relevant to the case before us. First, the Wage Appeals Board made clear that prevailing wage rates may be derived from collective bargaining agreements, not just from an area practice survey conducted by the Labor Department. Second, where the Department determines that prevailing wages are established by a collectively bargained agreement, the job classifications for the project or area at issue are also established by that agreement. We find both elements of two-decades old rule of *Fry Brothers* to be eminently reasonable. As the Wage Appeals Board explained:

> If a construction contractor who is not bound by classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act.

Fry Brothers at 42,762. In order to ensure that this evisceration of Davis-Bacon does not occur whenever the Department of Labor decides not to conduct an area practice survey, we adopt the rule of *Fry Brothers* here. Accordingly, we hold that an area practice survey is not a prerequisite to the determination of prevailing wage rates or job classifications.

[6] Second, contrary to the district court's conclusion, there was nothing uncertain about the Department's efforts to establish the relevant wage classifications, at least during the period of time that Roen was making its wage certifications. The District Director of the Labor Department's Wage and Hour Division, in both his 1994 and 1996 letters to Plumber's counsel, made explicit that the 1992 Agreement established

the prevailing practices for water treatment plants in Northern California. (ER 39). The letters could not have been clearer. The 1994 letter, for example, stated that "As of September, 1992, the agreement establishes the prevailing practice for Northern California for the construction of water treatment plants . . . . For contracts for the construction of such plants awarded after September 1992 and subject to Davis-Bacon and Related Acts the Wage and Hour Division will require the payment of prevailing wages in accordance with the [1992] agreement." (ER 39). The 1996 letter simply reconfirmed the 1994 letter. Moreover, although the letters were clear enough in themselves, the District Director also attached to his letters copies of the paragraphs of the 1992 Agreement that specified the relevant job classifications for piping work on water treatment facilities. The inclusion of these attachments enunciated the point that, according to the Wage and Hour Division, the relevant job classifications were established by the 1992 Agreement.

[7] It is true, of course, that in its March 1997 letter, the Wage and Hour Division stated that it could not enforce the 1992 jurisdictional agreement because there were "indications that the written agreement was not followed." (ER 27). This letter adds no support, however, to the district court's conclusion that the Department's efforts to resolve the classification issue were "uncertain[ ]," because the 1997 letter was sent *after* the period charged in the complaint. That is, during the period that Roen was submitting its disputed wage certifications, the department's position — as expressed in the 1994 and 1996 letters — remained consistent and was not uncertain.[2]

[2]Although neither party has raised this point, the record also reveals that in December, 1996 a letter was sent to the UA by William Buhl, the Regional Administrator of the Wage and Hour Division. In that letter, Buhl stated that the 1992 Agreement could not establish prevailing wage rates and job classifications because that Agreement had been repudiated. (ER 133). Whatever effect the letter had on the "certainty" of the Department's efforts to resolve the classification issue, and we do not decide that question, it could only have affected the certainty during the very end of the time period charged in plaintiffs' complaint. It could not, of course, had any such effect prior to the date it was written.

[8] If Roen believed that the Laborers' attempted recission of the Agreement affected the Department's classifications during the period covered by the complaint, it could have sought clarification. Yet Roen, without making any effort to obtain such clarification, certified that the Laborer's rate was the prevailing wage and that it had paid that wage. Roen does not explain the theory under which it certified that the Laborer's rate constituted the prevailing wage rate — even Roen acknowledges that the Department of Labor is the sole authority responsible for determining prevailing wages, (Appellee's Brief at 25), and the DOL's letter had adopted a different and higher rate. This suggests that Roen's certification may well have risen at least to the level of "deliberate ignorance" or "reckless disregard".

[9] We express no view on any other ground on which summary judgment might be based, or rejected. We may reverse an order granting summary judgment where the district court record " 'has not been sufficiently developed to allow the court to make a fully informed decision on particularly difficult and far reaching issues.' " *Anderson v. Hodel*, 899 F.2d 766, 770 (9th Cir. 1990) (*quoting* William Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 475 (1984)).[3] We have held, moreover, that in certain cases "summary judgment may be inapposite because the legal issue is so complex, difficult, or insufficiently highlighted that further factual elucidation is essential for its prudently considered resolution." *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 649 (9th Cir. 1974); *see also Tovar v. United States Postal Serv.*, 3 F.3d 1271, 1278-79 (9th Cir. 1993). The case before us fits

[3]The Supreme Court announced this principle in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), in which it held that in cases involving complex legal issues where the record in unclear it is "good judicial administration to withhold decision of the ultimate questions involved in th[e] case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts."

this bill. Questions regarding the precise manner in which the Department may or must determine prevailing wage rates and job classifications, the effect of the Department's post-hoc repudiation of earlier wage-rate determinations on the question of the falsity of previously submitted wage-rate certifications, the extent to which contractors may be deemed to have knowledge of the Department's actions, the type of certification that is appropriate if the contractor contends that no prevailing wage exists or that the classification issue remains unresolved, and the various other questions the resolution of which may be required before this case can be finally resolved are both difficult and insufficiently developed on the current record to allow for summary judgment. To this point, neither the district court nor the parties have devoted sufficient attention to the elucidation and resolution of these issues to permit us to deem a grant of summary judgment appropriate.

[10] The district court erred in concluding that because no area survey had been conducted and because the Department's other efforts to establish the relevant classifications were uncertain, summary judgment was proper. (ER 229). Further, development of numerous legal and factual issues is necessary before this case may be decided. We therefore reverse the district court's grant of summary judgment and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, dissenting:

The majority's discourse on labor law is interesting, scholarly, probably correct, but largely beside the point. This is a False Claims Act case. The point is not whether an area practice survey is the only way to establish prevailing wages. The point is that the undisputed facts did not show that Roen's

certifications, even if incorrect, were made with an intent to deceive as required by the FCA.

"For a qui tam action to survive summary judgment, the relator must produce sufficient evidence to support an inference of *knowing fraud*." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (emphasis added) (*quoting United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995)). As we said in *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992):

> The weakest account of the act's "requisite intent" is the "knowing presentation of what is known to be false." Citing Hagood, supra, 929 F.2d at 1421. The phrase "known to be false" in that sentence does not mean "scientifically untrue"; it means "a lie."

This is especially true in a False Claims Act case premised on a false certification. In *Hopper*, we specifically held, "For a certified statement to be 'false' under the Act, it must be an intentional, palpable lie." *Hopper*, 91 F.3d at 1267. The majority argues that these principles are "extraneous comments" that have been "read out of context to suggest that the FCA requires an intentional lie to trigger liability, . . ." With all due respect, if anything is out of context, it is the attempt to apply the False Claims Act to the resolution of a jurisdictional dispute between two unions, especially when one of the unions is not even a party to the lawsuit.

It is undisputed that at the time Roen submitted its first certification, both the Laborers and the Plumbers claimed jurisdiction over the piping work at the Laguna project. Two years earlier, prior to the commencement of the job, the Plumbers and the Laborers had a jurisdictional agreement regarding the type of work in issue. The two unions had agreed that it was Plumbers' work. It is undisputed that before Roen ever filed its first allegedly fraudulent certification, the Laborers rescinded the agreement and claimed the work as their own.

The majority makes much of the 1994 letter from the Department of Labor. The problem with the letter is that it is specifically premised on the existence of the Plumbers-Laborers agreement, the very agreement that the Laborers rescinded before the Laguna job began.

Perhaps the Laborers' attempted recission of the agreement was ineffective. Perhaps Roen could have sought a clarification. Perhaps Roen was governed by the Department of Labor's letter regardless of the status of the jurisdictional dispute between the Plumbers and the Laborers. Perhaps an area practice survey is not a prerequisite to the determination of prevailing wages. Perhaps, in other words, Roen's certifications were mistaken. All that may be true, but in a False Claims Act case, that's not enough. To survive Roen's summary judgment motion, the Plumbers also had to show that Roen acted with an intent to deceive. In my view, Judge Illston got it exactly right when she held that in light of the then-existing jurisdictional war between the two unions, "[The Plumbers] are unable to show that [Roen] knew of an intentional misclassification in their payroll records." I would affirm.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 26 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, ex rel. PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 38 and LAWRENCE J. MAZOLLA [sic],

Plaintiffs-Appellants,

v.

C.W. ROEN CONSTRUCTION CO.; BRUCE A. ROEN; and JERALDINE C. BREAULT,

Defendants-Appellees.

No. 97-17204
D.C. No. CV-96-2976-SI

ORDER

Before: SCHROEDER, REINHARDT, and SILVERMAN, Circuit Judges.

The panel has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35 (b).

The petition for rehearing, and the petition for rehearing en banc, are denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED
SEP 16 1997
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. PLUMBERS & STEAMFITTERS LOCAL UNION NO. 38 and LAWRENCE J. MAZZOLA,

Plaintiffs,

v.

C.W. ROEN CONSTRUCTION CO., BRUCE A. ROEN, and JERALDINE C. BREAULT,

Defendants.

_____/

No. C-96-2976 SI

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

On September 12, 1997, the Court heard argument on defendants' motion for summary judgment and plaintiffs' motion for leave to file an amended complaint. Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS defendants' motion and DENIES plaintiffs' motion.

BACKGROUND

Plumbers & Steamfitters Local Union No. 38 and Lawrence 1. Mazzola brought this qui tam suit against C. W. Roen Construction Co., an officer of the company, and one of its employees for alleged violations of the False Claim Act, 3 1 U. S. C. §§ 3729-3 3, and various state laws.

In 1994 C. W. Roen Construction Co. bid for and was awarded a contract with the City of Santa Rosa to undertake the Laguna Wastewater Treatment Plant Improvements Project ("Project"). Defendants' work began in 1994 and is scheduled to be completed later this month. Because the Project is federally-funded. in part, defendants have been required to comply with the Davis-Bacon Act, 40 U.S.C. § 276a, a law designed to protect laborers working on such government contracts.

At issue in this case are defendants' classifications of its workers. Regulations promulgated by the Department of Labor pursuant to the Davis-Bacon Act require contractors to establish and maintain payroll records that include, among other things, "[each worker's] correct classification." 29 C.F.R. § 5.5(a)(3)(I). Each week, the contractor is required to provide an updated copy of these records as well

as a Statement of Compliance (certifying that the information provided is correct) to the contracting agency. Id. at (a)(3)(ii).

Plaintiffs allege that the weekly Statements of Compliance submitted by defendants in the course of the Project have been "false," and thus actionable under the False Claims Act, because "defendants have claimed that their employees installing certain piping, including mechanical, pressure, process, soil, waste, vent, potable and non-potable water piping have performed work within a Laborer wage rate classification." Complaint ¶ 14. "In fact," the plaintiffs allege, "said work was and is within the Plumbers & Steamifitters wage classification." Id.

Plaintiffs filed their original complaint under seal on August 19, 1996, claiming that the above misclassifications of workers constitute violations of the False Claims Act and California's unfair competition laws. The United States did not elect to intervene in the case. and at a case management conference on May 30, 1997, the parties agreed that defendants' summary judgment motion would be heard on September 12, 1997. Defendants' motion was filed on August 8, 1997. On August 7, 1997, the day before defendants' summary judgment motion was due to be filed, plaintiffs filed a motion for leave to amend their complaint.

DISCUSSION

I. Defendants' Motion for Summary Judgment

A. Legal Standard for Summary Judgment

A motion for summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must then set forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

"[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248 (1986). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Falls Riverway Realty, Inc. v. Niagra Falls, 754 F.2d 49 (2d Cir. 1985); Thornhill Pub. Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

The evidence presented by the parties in support of or opposition to a-motion for summary judgment must be

admissible. See Fed. R. Civ. P. 56(e). In evaluating this evidence, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)); Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991).

B. False Claims Act Requirements

The False Claims Act imposes liability on one who "knowingly" presents the government with a "false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1) (Supp.1995).

Defendants' intent to defraud is central to the claim: "[a] request for payment containing falsities made with scienter (i.e. with knowledge of the falsity and with intent to deceive) must exist." United States ex. rel. Hopper v. Anton, 91 F.3d 1261, 1265 (9th Cir. 1996) (emphasis added) (quoting, concurring with district court's opinion). "For a qui tarn action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud." Id. at 1267 (quoting United States ex rel. Anderson v. Northern Telecom, 52 F.3d 810, 815 (9th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.C. 700, 133 LED.2d 657 (1996)).

C. Defendants' Motion

Defendants argue that the plaintiffs have failed to allege sufficient facts to protect their False Claims Act cause of action from summary judgment. After reviewing the record, this Court agrees.

Plaintiffs' attempt to use the False Claims Act as a vehicle for resolving a classification dispute -- which is at least related to, if not wholly reflective of, a territorial dispute between different unions -- fails due to the FCA's scienter requirement: plaintiffs are unable to show that defendants knew of an intentional misclassifications in their payroll records. This failure is inevitable given the uncertainty surrounding the Department of Labor's efforts to establish the classification relevant to this case and the undisputed fact that the Wage and Hour Division of the Department of Labor has not yet performed an area practice survey in Sonora County to determine the actual classification practices there.

Other courts have been hesitant to hear FCA claims based on the alleged misclassifications of workers because of the Davis-Bacon Act's regulatory scheme. In United States ex rel. Windsor v. DynCorp, Inc., 895 F.Supp. 844 (E.D. Va. 1995), the court held that "a Davis-Bacon Act worker classification dispute, by itself, is not an FCA claim because such disputes must be resolved by the Department of Labor." 895 F.Supp. at 852. In United States of America ex rel. I.B.E.W., AFL-CIO, Local Union No. 217 v. G. E. Chen Construction, Inc., 954 F.Supp. 195 (N.D. Cal. 1997), Judge Lynch concluded that, at least until plaintiffs had exhausted the Department of Labor's remedies, the court "lack[ed] jurisdiction to decide [misclassifications] claims." 954 F.Supp. at 197. And in United States of America ex rel. Plumbers and Steamfitters Local Union No. 342 v. Dan Caputo Co., 1996 WL 400967 (N.D. Cal. 1996), Judge Letts granted a motion to dismiss an FCA claim based on misclassifications because "judicial action should be deferred" until the Department of Labor concluded its classification findings. However the rationale

is articulated, it is clear that resolution of the sort of classification disputes presented in this case has been committed by Congress to the Department of Labor, not the courts.

Defendants' motion for summary judgment is granted because this court concludes that no reasonable juror could find that defendants' scienter rose to the level required by the False Claims Act. See Jackson v. Virginia, 443 U.S. 307, 318-319 (1979). Nor is there reason to stay or defer this action pending Department of Labor review, since later classification decisions would not retroactively "falsify" prior filings. In light of this disposition of the federal claims, plaintiffs' original state law claims are dismissed without prejudice.

II. Plaintiffs' Motion for Leave to Amend

A. Legal Standard for Granting a Motion for Leave to Amend

Federal Rule of Civil Procedure 15(a) provides for the amendment of pleadings by leave of the court and notes that such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). However, the grant or denial of a motion to amend is committed to the discretion of the district court, and denial is proper where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." Foman v. Davis, 371 U.S. 178, 182 (1962); see also Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 772 (9th Cir. 1991). An

amendment is considered futile when the added claim could be defeated by a motion to dismiss or for summary judgment. See Wilson v. American Trans Air, Inc., 874 F.2d 386, 392 (7th Cir. 1989).

B. Plaintiffs' Motion

Plaintiffs' First Amended Complaint contains nine new state claims but only one new federal claim. That federal cause of action, again under the False Claims Act, alleges that three individuals performing the disputed "steamfitting" work were improperly treated as independent contractors rather than employees.

The parties disagree whether these facts would give rise to a False Claims Act claim; each side cites United States of America ex rel. Hopper v. Anton, 91 F.3d 1261 (9th Cir. 1996), to support its position. The Hopper court rejected a "false certification" claim under the FCA based on the lack of a sufficient "nexus" between the alleged false claim and the United States' provision of a benefit. Id. at 1265-67. In plaintiffs' proposed First Amended Complaint, the violations alleged most likely lack this nexus, reflecting plaintiffs' overly-broad construction of the scope of the False Claims Act. See id.

In light of the disposition of defendants' pending summary judgment motion, the probability that plaintiffs' proposed federal claim would be futile as a matter of law, and the fact that nine out of the ten new claims in the proposed amended complaint are state-court claims, this Court exercises its discretion to deny plaintiffs' motion for leave to amend.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is GRANTED. Plaintiffs' motion for leave to amend the complaint is DENIED.

IT IS SO ORDERED.

Dated: September 16, 1997

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED
SEP 17 1997
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. PLUMBERS & STEAMFITTERS LOCAL UNION NO. 38 and LAWRENCE J. MAZZOLA,

Plaintiffs,

v.

C.W. ROEN CONSTRUCTION CO., BRUCE A. ROEN, and JERALDINE C. BREAULT,

Defendants.

_____/

No. C-96-2976 SI

JUDGMENT

In accordance with the order of the Court, judgment is hereby entered in favor of defendants C.W. Roen Construction Co., Bruce A. Roen, and Jeraldine C. Breault,

and against plaintiffs United States, ex rel. Plumbers & Steamfitters Local Union No. 38 and Lawrence J. Mazzola.

IT IS SO ADJUDGED.

Dated: September 17, 1997

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

APPENDIX D

31 U.S.C. Section 3729. False claims

(a) **Liability for certain acts.**--Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined**.--For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to

defraud is required.

(c) Claim defined.--For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.--Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. Section 3730. Civil actions for false claims

(a) Responsibilities of the attorney general.--The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.--(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. [FN1] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) **Rights of the parties to Qui Tam actions**.--(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action ifthe person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the

case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period

of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) **Award to Qui Tam plaintiff**.--(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action)

relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person

in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

31 U.S.C. Section 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circum stances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. Section 3732. False claims jurisdiction

(a) Actions under section 3730.--Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law.--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

Supreme Court, U.S.
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No. 99-633

IN THE
Supreme Court of the United States

C. W. ROEN CONSTRUCTION CO.,
BRUCE A. ROEN and JERALDINE C. BREAULT,
Petitioners,

v.

UNITED STATES OF AMERICA,
ex rel. PLUMBERS AND STEAMFITTERS
LOCAL UNION NO. 38
and LAWRENCE J. MAZZOLA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

JOHN J. DAVIS, JR.
Counsel of Record
MCCARTHY, JOHNSON & MILLER
595 Market Street
Suite 2200
San Francisco, California 94105
(415) 882-2992
Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF THE QUESTION PRESENTED

(Relating to Petitioners' Question 1)

The False Claims Act imposes liability for "knowingly" presenting false claims for contract payment. To receive payments on federally-funded construction projects, contractors must certify that they have properly classified and paid their workers. C.W. Roen deliberately violated a Department of Labor determination requiring that certain work be classified and paid at Steamfitter wage rates. It paid its employees at a lower rate, and then certified that they had been properly classified and paid. Did the Ninth Circuit correctly decide that C.W. Roen's scienter was sufficient for False Claims Act liability?

QUESTIONS *NOT* PRESENTED

(Relating to Petitioners' Questions 2 and 3)

This case does not present the second and third questions proffered by the petition, because the factual predicate on which they depend does not exist. Here DOL issued both a general wage decision that determined prevailing *wage rates* for the county where the work was performed, and a specific *classification* determination that prescribed which of those rates were to be paid for the work in issue here.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners ask the Court to invest its time and effort in deciding whether a contractor who deliberately violates a DOL classification determination, and then lies about it, has scienter under the False Claims Act. The petition identifies no conflict between Circuits and no question of national importance. Instead, it relies on pejorative characterizations and misstatements of fact and law. As the Court will readily see, this case does not merit its attention.

Aside from its utter failure to show any reason why review should be granted, the petition is most

noteworthy for its numerous mischaracterizations and misstatements of the record. For example:

- The petition attempts to portray this case as an inter-union jurisdictional dispute, an attempt to force the reassignment of work from one union to another. It is not. This case involves only the proper wage rate to be paid to C. W. Roen's employees, not their union affiliation.

  The petition goes so far as to describe the Complaint as stating that "such work should properly have been assigned to plumbers and steamfitters." [1] In fact, the Complaint does nothing of the sort.[2] The petition also argues that "Roen would have exposed itself to a breach of contract claim by the [Laborers' Union] if it had assigned the disputed work to UA members." [3] Yet defendants are well aware that under the Davis-Bacon Act, employers are not required to assign work to any particular union; they need only pay their workers the appropriate wage rates. Thus, Roen could have continued to use Laborers to perform the disputed work, as long as it paid them the proper Steamfitter wage rate.

  These misstatements are a transparent attempt to shift attention from the real issues in this case. They underscore the petition's lack of substance.

- The petition states repeatedly that the Department of Labor has not made any classification determination for the work in issue here.[4] This

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[1] Petition, p. 10, citing Complaint, ¶ 14.

[2] See Complaint, ¶ 14 (Appendix A hereto).

[3] Petition, p. 7.

[4] Petition, pp. i, 10 n.3, 14-15, 18, 23, 27.

is simply not true. The DOL District Director issued classification determinations covering this very work on January 18, 1994 and March 11, 1996.[5] The Ninth Circuit held that these were classification determinations,[6] and defendants have never offered evidence to the contrary. There is absolutely no basis for the assertion that no classification determination has been made.

- After stating that no classification determination has been made for this work, the petition claims that both the Ninth Circuit and plaintiffs "agree" that DOL has "withdrawn" those determinations.[7] This is untrue. The Ninth Circuit opinion simply describes subsequent letters from DOL, finding that they had no effect on the certainty of the DOL's classification determination during the period in question here.[8] Furthermore, plaintiffs' evidence showed that the District Director was fully authorized to make these classification determinations, while defendants presented no evidence that other DOL personnel could overrule or "withdraw" such a determination. In short, it is far from "agreed" that the classification determinations here have been "withdrawn."
- Defendants quote extensively from the Ninth Circuit's opinion in *U.S. ex rel. Plumbers and Steamfitters v. Dan Caputo Co.*,[9] arguing that under *Caputo* the court must defer to DOL on

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[5] CR 31, Tab 3 (Appendix B hereto); CR 31, Tab 26 (Appendix C hereto).

[6] 183 F.3d at 1090-1091, 1094.

[7] Petition, pp. 12, 16.

[8] 183 F.3d at 1094.

[9] 152 F.3d 1060 (9th Cir. 1998).

wage rate and classification determinations.[10] But the petition fails to point out that deferral in *Caputo* was *explicitly* premised on the fact that DOL had promised the court that it would make a determination for the project in issue within a short period of time, and it requested the opportunity to do so.[11] Lest its decision be overread, the Ninth Circuit cautioned in *Caputo* that "to invoke the doctrine of primary jurisdiction on an issue that an agency may never decide would postpone the resolution of the Union's claim indefinitely."[12] This is exactly the situation in the instant case, for here DOL has stated that it has no plans to conduct an area practice survey—a point the petition fails to mention as it attempts to show a conflict between this opinion and *Caputo*.

- Defendants rely on the "unrebutted" declaration of Richard Cheung for the proposition that the classification determinations here were erroneous, and that an area practice survey is necessary for determining classifications under the Davis-Bacon Act.[13] In fact, Mr. Cheung's declaration was thoroughly rebutted; it was shown to be false in both of its major contentions.[14]

Even with these mischaracterizations, defendants have not offered a "compelling reason," as required by Supreme Court Rule 10, to support a grant of certiorari here. The petition should therefore be denied.

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[10] Petition, pp. 21-23.

[11] 152 F.3d at 1062.

[12] *Id.*

[13] Petition, pp. 26-27.

[14] Plaintiffs' Opening Brief on Appeal, pp. 31-35; Plaintiffs' Reply Brief on Appeal, pp. 11-15.

REASONS THE PETITION SHOULD BE DENIED

The petition offers no grounds whatever for review by this Court. Nowhere does it argue that the Ninth Circuit opinion conflicts with opinions of this Court or another circuit court. Nor does it present—or even claim to present—an important question of federal law. Moreover, defendants cannot even demonstrate that the Ninth Circuit's opinion is erroneous. Accordingly, the petition should be denied.

I. THE PETITION DOES NOT SHOW ANY CONFLICT THAT THIS COURT SHOULD RESOLVE.

Under Supreme Court Rule 10(a), this Court may grant review of a circuit court decision where it conflicts with that of another circuit court or a state court of last resort. The petition does not allege such a conflict here.

Instead, it argues that the Ninth Circuit's opinion creates an *intra*-circuit conflict, saying that the court's holding diverges from earlier language used by the Ninth Circuit in False Claims Act cases.[15] Even if this were true, an intra-circuit conflict should be resolved by the Ninth Circuit itself; it is not a basis for granting certiorari.[16]

Moreover, there is no intra-circuit conflict here. As explained by the opinion in this case, the court of appeals did not change the definition of "knowingly" under the False Claims Act. Instead, it harmonized earlier Ninth Circuit dicta with the language of the

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[15] Petition, pp. 8-9, 16-17.

[16] Stern and Gressman, *Supreme Court Practice, 7th Ed.* (BNA 1993), pp. 176-77; see also *Davis v. United States*, 417 U.S. 333, 340, 41 L.Ed.2d 109, 94 S.Ct. 2298 (1974).

statute itself.[17] The court's holding in this case was grounded firmly and explicitly in the statutory language; the court merely disapproved previous dicta—but *not* case holdings—which seemed to depart from that language.[18]

Defendants argued vigorously in their petition for rehearing *en banc* that the panel's opinion created an intra-circuit conflict. Under Federal Rule of Appellate Procedure 35, a principal purpose of *en banc* review is "to secure or maintain uniformity of the court's decisions." Yet no Ninth Circuit judge, not even the judge who dissented from the panel decision here, voted to re-hear this case *en banc*. Clearly, no intra-circuit conflict exists.

The only other "conflict" the petition asserts is with the Eastern District of Virginia's opinion in *U.S. ex rel. Windsor v. DynCorp*.[19] The two holdings do not conflict, however, since their underlying facts are distinguishable. Here, because DOL had issued clear, unequivocal classification determinations, and because defendants received and ignored them, the Ninth Circuit held that defendants' statements of compliance could constitute false claims under the Act.[20] In *DynCorp*, by contrast, no relevant classification determinations had been made. The district court ruled that DOL would have to make such a determination before a False Claims Act violation could be found.

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[17] 183 F.3d at 1092-93.

[18] *Id.*

[19] 895 F. Supp. 844 (E.D. Va. 1995).

[20] 183 F.3d at 1094-95. Defendants' statements of compliance certified that they had paid their employees the wage rates applicable to their work.

Thus, the facts and holding of *DynCorp* are entirely distinguishable from the instant case. There is no conflict.

In short, defendants have failed to show any conflict that would warrant this Court's review under Supreme Court Rule 10. Defendants cannot even show an intra-circuit conflict, which in any event should be resolved by the Ninth Circuit itself, not by this Court. Clearly, the opinion creates no conflict to justify a grant of certiorari.

II. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION OF FEDERAL LAW.

In addition to its failure to show any conflict which requires this Court's resolution, the petition likewise fails to show—or even assert—that any important question of federal law is at stake here.[21] Nowhere does it argue or analyze why the issues here might be "important" to federal law. Absent such a showing, this Court should refuse to grant certiorari.

III. THE CASE WAS CORRECTLY DECIDED BY THE NINTH CIRCUIT.

As is shown above, the petition does not meet any criterion for certiorari under Supreme Court Rule 10. In addition, it does not even show that the Ninth Circuit's opinion is erroneous. For this reason as well, the petition should be denied.

The petition's primary argument (although not presented as an "important federal question") is that DOL, and not the district court, should make the relevant wage rate and classification determinations under the Davis-Bacon Act. This is a straw man,

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[21] Supreme Court Rule 10(c).

however, because here DOL *did* make the relevant classification determinations.[22]

Contrary to defendants' claims, here the Ninth Circuit did not decide whether district courts should make classification determinations under the Davis-Bacon Act. Instead, it held that area practice surveys are not the only way to make such determinations.[23] Under the long-established DOL rule stated in *Matter of Fry Bros.*,[24] the court held that classification determinations can be based on collective bargaining agreements that contain prevailing wage rates. Because that was the method used by DOL in this case, the Ninth Circuit found that the classification determinations were valid, even without an area practice survey.[25]

Much of the petition is devoted to arguing that district courts should not act as administrative agencies, that they do not have the resources or the expertise of a federal agency, and that they are not authorized to make classification determinations under the Davis-Bacon Act. But these are not questions presented here. And none of these results can flow from the Ninth Circuit's opinion, for it decides only the effect of classification determinations *made by DOL* under its own *Fry Bros.* methodology. The district court can use these determinations in making its decision under the False Claims Act.

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[22] In January 1994 and again in March 1996. (CR 31, Tab 3, Appendix B; CR 31, Tab 26, Appendix C.)

[23] 183 F.3d at 1093-94.

[24] Case No. 76-6, U.S.D.O.L. Wage Appeals Board (1977).

[25] 183 F.3d at 1093-94.

The petition also argues that there can be no liability for false claims where the "factual predicate for establishing falsity has been removed." [26] Defendants claim that DOL's classification determinations cannot be the basis of a false claim, since subsequent letters from DOL personnel have rendered them "inoperative." But the effectiveness of the subsequent DOL letters is very much in question.[27] Whatever the letters' effect after they were written, the Ninth Circuit correctly held that they could not have had any effect on the certainty of the DOL's classification determinations *before* they were written.[28] Accordingly, because defendants defied a clear DOL directive at the time they submitted their false certifications, they can be held liable under the False Claims Act. This issue, too, was correctly decided by the Ninth Circuit.[29]

CONCLUSION

The petition presents no issues which deserve this Court's review. The Ninth Circuit's opinion has not created any conflict, let alone a conflict meriting a grant of certiorari. Nor has it decided any important national questions which would warrant this Court's review. Finally, the petition does not even show that the opinion was erroneous.

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[26] Petition, p. 27.

[27] Plaintiffs' Opening Brief on Appeal, pp. 31-35.

[28] 183 F.3d at 1094.

[29] In their Summary of Argument (p. 15), defendants also argue that the United States was not damaged by their false claims. This issue is not included in the Questions Presented and was not raised in the Ninth Circuit. Accordingly, it should not be considered here. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970).

For all of these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN J. DAVIS, JR.
Counsel of Record
MCCARTHY, JOHNSON & MILLER
595 Market Street
Suite 2200
San Francisco, California 94105
(415) 882-2992
Attorneys for Respondents

November 5, 1999

APPENDIX A

[Filed Aug. 19, 1999]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-96-2976 SI

UNITED STATES OF AMERICA, ex rel. PLUMBERS & STEAMFITTERS LOCAL UNION No. 38 and LAWRENCE J. MAZZOLA,

Plaintiffs,

v.

C. W. ROEN CONSTRUCTION, Co., BRUCE A. ROEN, and JERALDINE C. BREAULT,

Defendants,

COMPLAINT

[False Claims Act]
[31 U.S.C. §§ 3729, *et seq.*]

JURISDICTION

1. This action is brought under the False Claims Act, 31 U.S.C. § 3729, *et seq.*, to recover monies falsely claimed by defendants and paid to them in the construction of a federally financed public works construction project. The Court's jurisdiction is conferred by 31 U.S.C. § 3730 and by 28 U.S.C. §§ 1331 and 1345.

2. This action also is brought under California Business and Professions Code §§ 17200, *et seq.* to enjoin defendants' continuing violations of the False Claims Act, the Davis-Bacon Act and the Copeland Anti-Kickback Act. The Court has supplemental jurisdiction of this claim under 28 U.S.C. § 1367.

VENUE

3. The acts complained of herein took place within the Northern District of California, specifically, in Sonoma County, California. Venue in the Northern District of California therefore is proper under 28 U.S.C. § 1391(b).

PARTIES

4. Plaintiff Plumbers & Steamfitters Local Union No. 38 ("U.A. Local 38") is a local labor organization representing plumbers, pipe fitters, steam fitters, gas fitters and refrigeration fitters in San Francisco, Marin, Sonoma, Lake and Mendocino Counties of California. Plaintiff U.A. Local 38 is affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, CLC ("United Association" or "U.A."). Plaintiff U.A. Local 38 has its principal office in San Francisco, California.

5. Plaintiff Lawrence J. Mazzola is a citizen and resident of San Francisco County, California. He is the Business Manager of plaintiff U.A. Local 38.

6. Defendant C. W. Roen Construction Co. is a corporation and a construction contractor doing business in the Northern District of California. Plaintiffs are informed and believe and thereupon allege that

said defendant has its principal place of business in Danville, California.

7. Defendant Bruce A. Roen is the President and Responsible Managing Officer ("RMO") of defendant C. W. Roen Construction, Co. As the RMO for defendant C. W. Roen Construction Co., defendant Roen is the qualifier for said defendant's contractor's license. In that capacity he is required by California Business and Professions Code § 7068.1 to exercise direct supervision and control over the operations of defendant C. W. Roen Construction Co. Plaintiffs are informed and believe and thereupon allege that defendant Roen has decided upon and directed the acts and practices of defendant C. W. Roen Construction Co. which are alleged herein. Plaintiffs are informed and believe and thereupon allege that defendant Roen resides within the Northern District of California.

8. Plaintiffs are informed and believe and thereupon allege that defendant Jeraldine Breault has been defendant C. W. Roen Construction Co.'s office manager on the construction project with which this lawsuit is concerned. Plaintiffs are informed and believe and thereupon allege that defendant Breault has signed or caused to be signed the false Statements of Compliance by which defendants obtained payments on the project. Plaintiffs are informed and believe and thereupon allege that defendant Breault resides within the Northern District of California.

STATEMENT OF CLAIM

9. On or about September 1, 1994, defendant C. W. Roen Construction Co. entered into a contract with the City of Santa Rosa, California, for the construction of a federally financed wastewater treatment

plant improvement project in said city, known as the Laguna Wastewater Treatment Plant Improvements Project ("Project"), for the sum of approximately $23,694,000.00. Because federal monies were used to finance the construction, the Project was and is governed by the provisions of the Davis-Bacon Act [40 U.S.C. § 276a], the Copeland Act [40 U.S.C. § 276c] and regulations promulgated thereunder [29 C.F.R. §§ 1.1 *et seq.* and 5.1, *et seq.*].

10. The Project construction contract incorporates the "contract documents" for the project, which documents include the notice inviting bids, instructions to bidders, bid forms, general conditions, supplementary conditions, general requirements, specifications, drawings and addenda, *inter alia*. Said contract documents are referred to collectively herein as the Project Contract Documents.

11. The Project Contract Documents require, *inter alia*, that defendants comply with the applicable U. S. Department of Labor general wage determinations, issued pursuant to the Davis-Bacon Act. Said wage determinations set out the prevailing wages defendants have been and are required to pay to persons employed in each of the various crafts and classifications of construction work involved in the construction of the Project. As required by the United States Environmental Protection Agency, the Project Contract Documents also include, *inter alia*, the labor standard provisions for federal and federally assisted contracts set forth at 29 C.F.R. § 5.5. The Project Contract Documents further provide that defendants are to comply with the more stringent of the prevailing wage requirements imposed by California or federal law.

12. Plaintiffs are informed and believe and thereupon allege that in the course of constructing the Project, defendants have made various claims for payment under the Project construction contract. Section 2 of the Copeland Act [40 U.S.C. § 276c], and the regulations promulgated thereunder, require as a prerequisite to payment that defendants submit weekly payroll reports and Statements of Compliance representing that defendants have complied with their prevailing wage and labor standards obligations.

13. In the course of constructing the Project, defendants have in fact filed such reports and statements. Defendants' Statements of Compliance have represented that defendants have paid to all persons employed on said project their full weekly wages as required by the contract, that the payrolls required to be submitted have been correct and complete, that the wage rates contained in said payrolls have been not less than the applicable wage rates contained in the contract's prevailing wage determination, and that the classifications set forth therein for each laborer or mechanic have conformed with the work he or she performed. The preprinted forms setting forth said Statements of Compliance include express warnings that the falsifications of any statement contained therein could subject the contractor to civil or criminal prosecution under the False Claims Act and 18 U.S.C. § 1001.

14. Said Statements of Compliance have been false, in that defendants have claimed that their employees installing certain piping, including mechanical, pressure, process, soil, waste, vent, potable and non-potable water piping have performed work within a Laborer wage rate classification. In fact, said work

was and is within the Plumbers & Steamfitter wage rate classification. Under General Wage Decision No. CA 940004, Modification No. 3, the United States Department of Labor's general wage determination governing the Project, the Plumber & Steamfitter wage rate has been approximately $24.43 per hour higher than the Laborer wage rate actually paid by defendants to the employees performing said piping work. Said Plumber & Steamfitter wage rate is the same as the rate negotiated by plaintiff U.A. Local 38 in its collective bargaining agreement.

15. More particularly, defendants have been and are obliged to pay Plumber & Steamfitter wage rates to persons performing piping work of every description and material, including but not limited to the unloading, distribution, fabrication, installation and testing of all process piping, waste, vent, drain, vacuum, chemical, gas, petrochemical, domestic and process water piping, valves, hangers and supports, temporary piping of every description, pneumatic instrumentation and controls, hydraulic piping and tubing, all mechanical process equipment including pumps, compressors, boilers, heat exchangers, centrifuges, heaters, tanks, chlorinators, ejectors and blowers, including all accessories and appurtenances, for mechanical process equipment. The only piping work for which the Laborer wage rate has been properly payable on the Project was the installation of surface and storm drain piping.

16. Plaintiffs are informed and believe and thereupon allege that construction of the Project requires approximately 28,640 hours of work for which Plumber & Steamfitter wages are required to be paid.

17. Plaintiffs are informed and believe and thereupon allege that from August 15, 1994 through April

21, 1996, defendants have filed said false Statements of Compliance for at least 77 weeks during the construction of the Project. Plaintiffs are informed and believe and thereupon allege that since April 21, 1996, said defendant have continued and will continue to file such false Statements of Compliance through the completion of the Project, which is expected to be in mid-February of 1997.

18. In doing the acts described above, defendants violated the Davis-Bacon Act, the Copeland Act, the regulations promulgated thereunder at 29 C.F.R. §§ 1.1, *et seq.* and 5.1, *et seq.*, the False Claims Act and 18 U.S.C. § 1001.

19. As a direct and proximate result of defendants' violations of the Davis-Bacon Act and the regulations promulgated thereunder, the employees of defendant C. W. Roen Construction Co. who performed work within the Plumber & Steamfitter wage rate classification were paid substantially less than they were required to be paid for such work. Plaintiffs are informed and believe and thereupon allege that said underpayment by defendant C. W. Roen Construction Co. on the Project will exceed $699,675.20.

20. As a further direct and proximate result of defendants' violations of the Davis-Bacon Act and the regulations promulgated thereunder, defendants have frustrated the Congressional intent that all work of a similar character be paid applicable prevailing wages as set forth in the United States Department of Labor's General Wage Decisions. Defendants have thereby deprived the United States of America of the full benefit of its bargain in funding the Project.

FIRST CLAIM FOR RELIEF: FALSE CLAIMS ACT VIOLATIONS BY DEFENDANTS C. W. ROEN CONSTRUCTION CO., BRUCE A. ROEN AND JERALDINE C. BREAULT

21. By using false Statements of Compliance as described above in order to obtain contract payments on the Project, defendants knowingly made, used and caused to be made and used false statements to get false or fraudulent claims paid within the meaning of and in violation of the False Claims Act, 31 U.S.C. § 3729.

22. Plaintiffs discovered the False Claims Act violations set forth herein through their own independent investigation.

23. Plaintiffs are informed and believe and thereupon allege that the False Claims Act violations set forth herein are not the subject of a civil suit or an administrative civil money penalty proceeding in which the United States Government is already a party.

24. Plaintiffs are informed and believe and thereupon allege that the False Claims Act violations set forth above have not been publicly disclosed in a criminal, civil or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit or investigation, or by the news media. Even if said violations had been so disclosed, the Court nevertheless would have jurisdiction of this action because plaintiffs are an original source of the information relating to the violations set forth above.

25. Plaintiffs have direct and independent knowledge of the information establishing the False Claims

Act violations set forth above and have voluntarily provided said information to the United States Government before filing this action.

26. By reason of the False Claims Act violations set forth above, each of defendants C. W. Roen Construction, Co., Bruce A. Roen, and Jeraldine C. Breault, is liable to the United States Government for a civil penalty of not less than $5,000.00 nor more than $10,000.00 for each of the false Statements of Compliance they submitted during the construction of the Project, in an amount exceeding $770,000.00.

27. By reason of the False Claims Act violations set forth above, defendants are further liable to the United States Government for three times the damages sustained because of said violations. Plaintiffs are informed and believe and thereupon allege that said treble damages exceed the sum of $2,099,025.60.

SECOND CLAIM FOR RELIEF: CALIFORNIA BUSINESS AND PROFESSIONS CODE VIOLATIONS BY ALL DEFENDANTS

28. Defendants' acts and practices described above were and are acts of unfair competition under California Business and Professions Code §§ 17200, *et seq.*

29. Plaintiffs are informed and believe and thereupon allege that defendants continue to perform the above-described piping work on public works projects, continue to violate the Davis-Bacon Act, the Copeland Act and the regulations promulgated thereunder by underpaying their employees performing said piping work, and unless enjoined and restrained by this Court from doing so, defendants will continue to violate the prevailing wage laws.

30. Defendants' acts and practices described above therefore are subject to injunction by this court pursuant to California Business and Professions Code §§ 17203 and 17204.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

1. On their first claim for relief,

a. For an award to the United States Government of $10,000.00 against each of defendants C. W. Roen Construction, Co., Bruce A. Roen, and Jeraldine C. Breault for each false claim submitted during the construction of the Project, in a total amount to be proved at trial herein, which plaintiffs estimate will exceed $2,310,000.00, and

b. For an award to the United States Government of a sum exceeding $2,099,025.60 in treble damages, according to the proof herein, and

c. For an award to plaintiffs of 30 percent of the proceeds of any judgment or settlement herein, and

d. For an award to plaintiffs of their expenses, attorneys' fees and costs incurred herein.

2. On their second claim for relief,

a. For the Court's permanent injunction

i. Restraining defendants and their officers, representatives, agents and employees, and all persons acting in concert or participation with them, from violating the Davis-Bacon Act, the Copeland Act, and the regulations promulgated thereunder, and

ii. Directing defendants and their officers, representatives, agents and employees, and all persons acting in concert or participation with them, to take such affirmative action as will secure defendants' compliance therewith, and

b. For an award to plaintiffs of their expenses, attorneys' fees and costs incurred herein.

3. On both claims for relief, for such other and further relief as the Court deems just and proper.

Dated: August 19, 1996

McCarthy, Johnson & Miller,
Law Corporation

By: /s/ John J. Davis, Jr.
John J. Davis, Jr.

By: /s/ Patricia A. McCormick
Patricia A. McCormick
Attorneys for Plaintiffs

APPENDIX B

U.S. DEPARTMENT OF LABOR [DoL Logo]

Employment Standards Administration
Wage and Hour Division
211 Main Street, Room #341
San Francisco, CA 94105
Phone: (415) 744-6620

January 18, 1994

John J. Davis, Jr., Esq.
McCarthy, Johnson & Miller
595 Market Street, Suite 2200
San Francisco, California 94105

RE: AGREEMENT BETWEEN NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS AND PIPE TRADES DISTRICT COUNCIL NO. 51

Dear Mr. Davis:

This letter is as per our discussion of January 7, 1994 related to the subject agreement. As of September, 1992, the agreement establishes the prevailing practice in Northern California for the construction of water treatment plants, wastewater treatment plants, water reclamation plants and all pumping facilities related to such plants in Northern California. For contracts for the construction of such plants awarded after September, 1992 and subject to Davis-Bacon and Related Acts the Wage and Hour Division will require the payment of prevailing wages in accordance with the agreement.

A copy of the agreement is attached. If you should have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Frank A. Conte
FRANK A. CONTE
District Director

Enclosure: copy of agreement

FAC:ysy

AGREEMENT BETWEEN
NORTHERN CALIFORNIA DISTRICT COUNCIL
OF LABORERS AND PIPE TRADES
DISTRICT COUNCIL NO. 51

1) In the construction of water treatment plants, wastewater (i.e., sewage) treatment plants, water reclamation plants, and all pumping facilities related to such plants, for work performed both inside and outside of buildings, the prevailing rate of per diem wages established for Plumber-Steamfitter-Pipefitter is paid to those employees who perform all piping work of every description and material (except as noted in paragraph 2), including but not limited to the unloading, distribution, fabrication, installation and testing of all process piping, soil, waste, vent, drain, vacuum, chemical, gas petrochemical, domestic and process water piping, valves, hangers and supports, temporary piping of every description, pneumatic instrumentation and controls, hydraulic piping and tubing, all mechanical process equipment including the setting of pumps, compressors, boilers, heat exchanges, centrifuges, heaters, tanks, chlorinators, ejectors and blowers integral to the piping system and all related piping thereof, including all accessories and appurtenances, for mechanical process equipment.

2) The prevailing rate of per diem wages established for Laborers is paid to those employees who, on the facilities described above, perform the installation of non-pressurized surface and storm drain piping the infall and outfall lines and bypass feed lines and all laborers work in connection with cribbing and shoring, the breaking of concrete, pipe wrapping, dig-

ging, backfilling, tamping, resurfacing and paving of all ditches.

3) This language is agreed to by the Northern California District Council of Laborers and the Pipe Trades District Council #51.

/s/ Archie Thomas
ARCHIE THOMAS
Business Manager
Northern California
District Council
of Laborers

Dated: Sept. 2, 1992

/s/ Tom Hunter
TOM HUNTER
Business Manager
Pipe Trades District
Council #51

Dated: Sept. 1, 1992

APPENDIX C

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE HOUR DIVISION
211 Main Street, Suite 341
San Francisco, CA 94105
Phone: (415) 744-6620
FAX: (415) 744-7998

[DoL Logo]

March 11, 1996

John J. Davis, Jr., Esq.
McCarthy, Johnson & Miller
595 Market Street, Suite 2200
San Francisco, CA 94105

Re: Agreement Between Northern California District Council of Laborers and Pipe Trades District Council No. 51

Dear Mr. Davis:

This letter supersedes earlier correspondence from the Wage and Hour Division regarding the subject of prevailing practice as it pertains to the payment of wage rates for the construction of water treatment plants, wastewater plants, water reclamation plants and all pumping facilities related to such plants.

The Wage and Hour Division has determined that the Agreement between Northern California District Council of Laborers and Pipe Trades District Council No. 51 (copy attached) reflects a longstanding prevailing practice. The Department of Labor will therefore accept this Agreement as reflecting the prevailing practice.

Accordingly, for contracts for the construction of such plants awarded after September, 1992 and subject to the Davis-Bacon and Related Acts, the Wage and Hour Division will require the payment of prevailing wages in accordance with the Agreement. The Division is proceeding with enforcement action on such projects.

Sincerely,

/s/ Frank A. Conte	/s/ Richard Cheung
FRANK A. CONTE	RICHARD CHEUNG
District Director	Regional Wage Specialist

Enclosure: Copy of Agreement

AGREEMENT BETWEEN NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS AND PIPE TRADES DISTRICT COUNCIL NO. 51

1) In the construction of water treatment plants, wastewater (i.e., sewage) treatment plants, water reclamation plants, and all pumping facilities related to such plants, for work performed both inside and outside of buildings, the prevailing rate of per diem wages established for Plumber-Steamfitter-Pipefitter is paid to those employees who perform all piping work of every description and material (except as noted in paragraph 2), including but not limited to the unloading, distribution, fabrication, installation and testing of all process piping, soil, waste, vent, drain, vacuum, chemical, gas petrochemical, domestic and process water piping, valves, hangers and supports, temporary piping of every description, pneumatic instrumentation and controls, hydraulic piping and tubing, all mechanical process equipment including the setting of pumps, compressors, boilers, heat exchanges, centrifuges, heaters, tanks, chlorinators, ejectors and blowers integral to the piping system and all related piping thereof, including all accessories and appurtenances, for mechanical process equipment.

2) The prevailing rate of per diem wages established for Laborers is paid to those employees who, on the facilities described above, perform the installation of non-pressurized surface and storm drain piping the infall and outfall lines and bypass feed lines and all laborers work in connection with cribbing and shoring, the breaking of concrete, pipe wrapping, digging, backfilling, tamping, resurfacing and paving of all ditches.

3) This language is agreed to by the Northern California District Council of Laborers and the Pipe Trades District Council #51.

/s/ Archie Thomas
ARCHIE THOMAS
Business Manager
Northern California
District Council
of Laborers

Dated: Sept. 2, 1992

/s/ Tom Hunter
TOM HUNTER
Business Manager
Pipe Trades District
Council #51

Dated: Sept. 1, 1992